

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA
8

* * * * *

9 CASS, INC., a California corporation,

10 Plaintiff,

11 v.

12 PRODUCTION PATTERN AND FOUNDRY
13 CO., INC., a Nevada corporation, AKA
14 PRODUCTION PATTERN & FOUNDRY,

15 Defendant.

3:13-cv-00701-LRH-WGC

ORDER

16 This is a contract dispute between plaintiff CASS, Inc., and defendant Production Pattern
17 and Foundry Co., Inc. (“PPF”) stemming from a series of contracts regarding CASS’s sale of
18 aluminum alloy to PPF. PPF has moved for summary judgment on all of CASS’s claims (ECF
19 No. 107¹), and CASS has moved for partial summary judgment on its two separate breach-of-
20 contract claims (ECF Nos. 108–09²). PPF has also moved to strike various exhibits that CASS
21 included in its summary-judgment motions (ECF No. 117³), while CASS has filed objections to
22 several of PPF’s filings (ECF Nos. 119, 120, 130, 131, and 132⁴).
23

24 ¹ CASS has filed a response (ECF No. 118), to which PPF replied (ECF No. 124).

25 ² PPF has responded to both of CASS’s partial summary-judgment motions (ECF No. 115–16),
26 and CASS has replied (ECF No. 126–27).

27 ³ CASS has filed a response (ECF No. 128), to which PPF replied (ECF No. 133).

28 ⁴ PPF has filed a notice of non-response to CASS’s objections, asserting that they are merely
repetitive form objections and offering to file a response upon court order. ECF No. 125.

1 For reasons discussed below, the court will deny both parties summary judgment on
2 CASS's first breach-of-contract claim. The court will, however, grant CASS summary judgment
3 on its second contract claim, but only as to the unpaid invoice balance and not the contractual
4 interest. Moreover, the court will grant PPF summary judgment on CASS's unjust-enrichment
5 and quantum-meruit claims but deny it summary judgment on the breach of the implied covenant
6 of good faith and fair dealing. The court will also deny PPF's motion to strike.

7 **I. Background**

8 CASS is an aluminum distributor⁵ for non-party Alcoa, an aluminum producer. PPF is a
9 Nevada-based foundry that works exclusively with aluminum alloy. Because PPF is a relatively
10 small enterprise, it is unable to buy aluminum directly from Alcoa and thus contracts with CASS.
11 One of PPF's clients is non-party PACCAR, a truck manufacturer. Prior to the dispute at issue,
12 PPF purchased aluminum alloy primarily from CASS and used the aluminum to produce
13 aluminum castings for PACCAR.

14 This supply chain and its underlying contracts are best understood in reverse. PACCAR
15 would place orders with PPF for aluminum castings. PACCAR does *not* have a contractual
16 relationship with either PPF or Alcoa. In order to produce the requested parts for PACCAR, PPF
17 would order aluminum alloy directly from CASS through a contractual relationship that will be
18 described shortly. CASS would then contract with Alcoa to fill PPF's aluminum orders. Alcoa
19 does not have a contractual relationship with PPF or PACCAR.⁶

20 Prior to the beginning of each new calendar year, PPF would estimate its aluminum needs
21 for that upcoming year based on projected orders provided by PACCAR. PPF would then
22 contract with CASS, committing to purchase a specific quantity of aluminum from CASS for the
23 upcoming year for a fixed price per pound. The parties refer to this type of transaction as a
24 "hedge." These contracts would take the form of a "sales order" sent from CASS to PPF,
25

26 ⁵ While CASS refers to itself as an aluminum "broker," PPF asserts that it is actually a
27 distributor. There does not appear to be any legal relevance to this distinction.

28 ⁶ Despite this fact, PPF would receive shipments of aluminum directly from Alcoa rather than
from CASS. The parties do not highlight any legal significance to this fact.

1 specifying the pounds of aluminum that PPF was committing to purchase and the fixed price per
2 pound.⁷ *E.g.*, ECF No. 107-1 at 9.

3 The benefit of forming a hedge is that PPF is guaranteed the contracted fixed price per
4 pound for that quantity of aluminum, even if the current market price of aluminum alloy
5 increases during the calendar year.⁸ ECF No. 108 at 4. Conversely, there is a risk that the market
6 price can fall below the fixed price, resulting in PPF being contractually obligated to purchase
7 aluminum at a higher-than-market price. *Id.* Additionally, as demonstrated in this dispute, PPF is
8 obligated to purchase the contracted *quantity* of aluminum, even if PPF's actual demand for
9 aluminum during the year falls short of this amount.

10 In order to supply PPF the contracted quantity of aluminum at a fixed price, CASS would
11 separately contract with Alcoa for a corresponding quantity at a fixed price. *Id.* at 5. In order to
12 guarantee this fixed price, Alcoa would hedge the quantity of aluminum in the futures market. *Id.*
13 Accordingly, the quantity of aluminum ordered by PPF for a particular year could not be
14 adjusted, a fact reiterated in the relevant sales orders between CASS and PPF, as well as the
15 contracts between Alcoa and CASS. *E.g.*, ECF No. 107-1 at 9.

16 Although PPF would contractually commit to purchasing a fixed quantity of aluminum
17 for the next calendar year, it was not required to either receive or pay for the entire quantity up
18 front. Instead, PPF would periodically send CASS purchase orders throughout the contracted
19 year for a specific quantity of aluminum that PPF needed in order to fill PACCAR's orders. ECF
20 No. 106 at 4. Each purchase order would be drawn from the total contracted quantity and shipped
21 to PPF. *Id.* CASS would then invoice PPF for that specific aluminum shipment, with payment
22 due within thirty days.

23 PPF asserts that the sales orders did not require it to commit to a firm delivery schedule
24 with CASS—i.e., one in which PPF was required to receive monthly shipments of a fixed or

25 ⁷ In order to help distinguish between the contracts between CASS and PPF and other contracts
26 related to this dispute, the court will exclusively refer to the CASS-PPF contracts as "sales
27 orders."

28 ⁸ PPF alleges that it passes on its aluminum costs to PACCAR and thus enters into hedge
contracts for PACCAR's benefit. ECF No. 106 ¶ 5.

1 minimum quantity of aluminum. *Id.* PPF alleges that it could not commit to a firm delivery
2 schedule and that a long-term custom and practice had developed between itself and CASS,
3 whereby PPF would only place purchase orders with CASS based on PPF's "current production
4 requirements." *Id.* In other words, PPF would not order aluminum from CASS until after PPF
5 had received a production order from PACCAR. *Id.* PPF alleges that it would normally place
6 orders with CASS on a weekly or semi-weekly basis. *Id.* At no point does CASS directly address
7 this contention or offer a conflicting narrative.

8 During the summer of 2007, CASS and PPF entered into three separate sales orders to
9 provide PPF with aluminum alloy at a fixed price for 2008. It is undisputed that these sales
10 orders were later consolidated into a single contract, Sales Order 17675 (the "2008 sales order"),
11 wherein CASS agreed to sell and PPF agreed to purchase 3,060,000 lbs. of aluminum alloy at a
12 fixed price per pound. ECF No. 108 at 4–5; ECF No. 107-1 at 9.

13 At this juncture, the case's facts diverge into two streams. CASS has brought two
14 separate breach-of-contract claims, and each factual stream is relevant to a different claim.

15 **A. First breach-of-contract claim**

16 This first claim is premised on the undisputed fact that PPF did not purchase over
17 400,000 lbs. of aluminum from the 2008 sales order. The claim is also premised on the
18 undisputed fact that PPF did not purchase any of the aluminum from the 2009 sales orders,⁹
19 which are described immediately below.

20 ///

21 ///

23 ⁹ Both parties refer to the sets of sales orders differently. PPF refers to the sales order that was
24 executed in 2007 and that originally called for aluminum deliveries in 2008 as "Sales Order
25 17675." CASS refers to this contract as the "2008 sales order" or "2008 hedges." Similarly, PPF
26 refers to the sales orders that were executed in 2008 and that originally called for aluminum
27 deliveries in 2009 as the "2008 sales orders," while CASS refers to them as the "2009 sales
28 orders" or "2009 hedges." Because the year the parties executed the contracts is mostly
irrelevant, the court will refer to the first contract, which called for the delivery of aluminum in
2008, as the "2008 sales order" and refer to its underlying goods as "2008 aluminum." The court
will therefore refer to the contracts that called for delivery in 2009 as the "2009 sales order" and
refer to its underlying goods as "2009 aluminum."

1 **1. Modification of 2008 sales order & formation of 2009 sales orders**

2 Due to the economic downturn that began in 2007, PPF realized in May 2008 that, for the
3 first time in its relationship with CASS, it would not be able to purchase all of the hedged
4 aluminum it had contractually committed to purchasing. ECF No. 106 at 5. Thus, in mid-2008,
5 CASS agreed to allow PPF to “carry over” the unused portion of the 2008 aluminum into 2009 at
6 a penalty of .005 cents per pound per month. *Id.*

7 There is a lack of clarity, however, regarding the terms of this modification. PPF asserts
8 that the modification of the 2008 sales order allowed PPF to carry over the unused portion of the
9 2008 aluminum until the end of 2009. *E.g., id.* Because there was a per-month penalty, the longer
10 into 2009 it took PPF to purchase the 2008 aluminum, the higher the penalty per pound would
11 be. Conversely, CASS asserts—for the first time in its first summary-judgment motion—that
12 “PPF was expected to take delivery of the remaining aluminum in January and February 2009.”
13 ECF No. 108 at 5. CASS never explains this assertion.

14 Nonetheless, it is undisputed that, at the same time that PPF and CASS negotiated the
15 modification of the 2008 sales order, they entered into several sales orders for 2009 (collectively
16 “2009 sales orders”). These sales orders, like each prior sales order, guaranteed PPF a quantity of
17 aluminum at a fixed price—in this case, 1,587,000 lbs. of aluminum in total. *Id.* at 6. But unlike
18 the original 2008 sales order, the 2009 sales orders contained an explicit provision that allowed
19 PPF to carry over any unused aluminum from 2009 into 2010: “Total contracted tonnage must be
20 taken during the contracted terms. Tonnage **forwarded into 2010** at a \$.005/LB penalty per
21 month.” ECF No. 107-1 at 16–19 (emphasis added). These sales orders each set a delivery
22 schedule of quarter 2 through quarter 4 of 2009. *Id.*

23 As discussed above, CASS would contract with Alcoa each year in order to fill its sales
24 orders with PPF. Thus, the 2008 contracts between Alcoa and CASS (“2008 Alcoa contracts”)
25 supplied the aluminum that was guaranteed in the 2008 sales order between CASS and PPF for
26 the latter’s purchase of aluminum in 2008—with CASS permitting PPF’s carry over into at least
27 some portion of 2009 at a penalty. ECF No. 106 at 4–5; *see also* ECF No. 107-1 at 12–14.
28 Similarly, the 2009 contracts between Alcoa and CASS (“2009 Alcoa contracts”) supplied the

1 aluminum that was guaranteed in the 2009 sales orders between CASS and PPF—with CASS
2 permitting PPF’s carry over into 2010 at a penalty. ECF No. 106 at 4–5; *see also* ECF No. 107-1
3 at 21–24.

4 **2. Alcoa alters its hedging policies**

5 PPF asserts that the carry-over policy in the modification of the 2008 sales order and the
6 2009 sales orders partially mirrored provisions in CASS’s 2008 and 2009 contracts with Alcoa.
7 The 2008 Alcoa contracts state, “A rescheduling fee of \$.005/lb per month will be levied to
8 move any tonnage beyond the hedged month.” ECF No. 107-1 at 12–14. The 2009 contracts had
9 a similar but not identical provision: “If you reschedule any or all committed tonnage for a given
10 month[,] a rescheduling fee will be assessed at the quoted by our broker to move any tonnage
11 beyond the hedged month.”¹⁰ *Id.* at 21–24. PPF thus asserts that, by allowing PPF to carry over
12 its unused 2008 and 2009 aluminum into 2009 and 2010 respectively, CASS was merely
13 exercising a similar contractual right in its own contracts with Alcoa.

14 However, on October 14, 2008, less than a week after CASS executed the 2009 Alcoa
15 contracts, Alcoa wrote to CASS informing it that Alcoa had “revised” its hedging service. *Id.* at
16 61. In order to carry over a hedged month, CASS would now need to seek approval from one of
17 Alcoa’s vice presidents. *Id.* Three months later, on January 22, 2009, an Alcoa sales director
18 emailed a CASS representative informing him that, “[s]ince about a week ago[,] [Alcoa]
19 management is not allowing us to roll positions forward anymore.” *Id.* at 63.

20 One week later, on January 29, Alcoa emailed CASS, informing it that Alcoa would “no
21 longer move fixed price metal positions forward.” *Id.* at 167. Alcoa elaborated that its new
22 position meant that CASS would have to either (1) take the aluminum “as priced for the
23 respective monthly quantities” or (2) “the hedge, or a portion of the hedge will need to be
24 ‘unwound’ and the mark to market difference will be invoiced” *Id.*

25 ///

27 ¹⁰ The 2009 Alcoa contracts each seem to be missing the word “rate” or “penalty: “a
28 rescheduling fee will be assessed at the [rate or penalty] quoted by our broker to move any
 tonnage beyond the hedged month.”

1 “Unwinding” or “ringing out” a hedge refers to rescinding the contract, which entails the
2 buyer paying the difference between the aluminum’s contract price and its market price at the
3 time of rescission. ECF No. 106 at 8.

4 **3. CASS makes demands of PPF regarding the 2008 & 2009 sales orders**

5 On February 2, 2009, CASS emailed PPF, informing it that, until PPF returned to “the
6 weekly payment program,” CASS could not ship any additional aluminum to PPF. ECF No. 108
7 at 8; ECF No. 108-3 at 74. This reference, although relevant to this first breach-of-contract
8 claim, appears to stem from CASS’s second claim, which involves PPF not paying the balance
9 on several invoices for purchase orders it placed under the 2008 sales order. However, this is the
10 only mention in either of CASS’s summary-judgment motions of a weekly payment plan, and
11 CASS provides no elaboration.

12 On February 13, a conference call took place between PPF and CASS officers and sales
13 representatives. PPF asserts—and CASS does not appear to dispute—that CASS made two
14 primary demands of PPF during this call. ECF No. 106 at 9. First, CASS demanded that PPF
15 convince PACCAR¹¹ to form a contract committing to either (1) take possession of the
16 remainder of the unused 2008 aluminum (from the 2008 sales order) *or* (2) unwind the hedges
17 for the remaining aluminum.¹² *Id.* Second, CASS demanded that PPF convince PACCAR to
18 consent to CASS and PPF modifying the 2009 sales orders to negate the provision allowing PPF
19 to carry over the 2009 aluminum into 2010. *Id.*

20 The parties do, however, dispute whether CASS presented these demands as an
21 ultimatum. PPF alleges that CASS threatened to stop shipping aluminum to PPF starting April 1,
22 2009, if PPF did not agree to its demands. *Id.*

23 ///

24
25 ¹¹ Although PACCAR is not a party to the CASS-PPF sales orders, CASS was presumably
26 attempting to involve PACCAR in these contract modifications because PPF passes on its
27 aluminum costs to PACCAR and thus enters into hedge contracts for PACCAR’s benefit. *See*
supra n.8.

28 ¹² Presumably, PPF and/or PACCAR, rather than Alcoa or CASS, was expected to absorb the
cost of unwinding the hedge.

1 **4. Emails between CASS, PPF, & PACCAR regarding CASS's demands**

2 In support of its assertion, PPF highlights several emails it sent to CASS and PACCAR
3 over the following month.¹³ On February 16, 2009, PPF emailed CASS to summarize what terms
4 PPF believed it was expected to present PACCAR based on the February 13 conference call.
5 ECF No. 107-2 at 26. Because the email is presented as bullet points, the content is not
6 completely clear. However, PPF explicitly wrote, “Without these agreements in place
7 PPF/PACCAR takes a risk in Alcoa-CASS stop[ping] shipment of supporting alloys by April
8 1st.” *Id.* CASS allegedly never contradicted this email, but rather forwarded it on to Alcoa. ECF
9 No. 106 at 9; ECF No. 107-1 at 178.

10 On February 25, PPF once again emailed CASS, “mak[ing] sure” it understood Alcoa’s
11 demands before communicating them to PACCAR. ECF No. 107-2 at 28. PPF made no mention
12 of CASS’s alleged threat to halt aluminum shipments; however, PPF did discuss CASS’s
13 demand that PACCAR contractually agree to negate “the ‘current carry forward option’ and
14 [put] in place an agreement to unwind 2009 hedges as they are unused.” *Id.* CASS replied that
15 “[e]verything looks fine.” *Id.* at 29. That same day, PPF emailed PACCAR, outlining the
16 following demands by CASS:

17 CASS/Alcoa will allow PPF to continue to carry the 2008 contract forward into
18 Qtr 2 without unwinding the hedges.
19 CASS/Alcoa needs, from PACCAR, a signed contract negating the current “carry
20 forward option” and in place an “agreement” to unwind 2009 hedges as they are
21 unused.

22 *Id.* at 31. PPF further stated that “Alcoa has made it clear to our broker that they will no longer
23 be offering this carry foreword option and it is imperative that this issue gets resolved prior to
24 April 1st or our broker has instructed us that Alcoa/CASS will stop shipment of aluminum until
25 we can resolve this matter.” *Id.* PPF then forwarded this email to CASS. *Id.*

26 ///

27 ¹³ Beyond the emails discussed below, PPF has provided notes from the conference call
28 handwritten by its senior vice-president, Stephen Cochran. ECF No. 107-2 at 23–24. The bullet
points do cover CASS’s demands and state the following: “Alcoa–Hedges. W/o a revised
contract Alcoa/CASS will stop shipment April 1st.” *Id.*

1 PPF alleges that on March 3, 2009, CASS, due to demands from Alcoa, pushed the April
2 1 deadline for acceding to the above-mentioned demands forward to March 6. ECF No. 106 at
3 10. PPF cites to an email from CASS in which CASS stated that Alcoa would “liquidate”—
4 presumably unwind—the hedges for the 2008 sales order by March 6 unless PPF provided a
5 “commitment to close out the 2008 hedges or a consumption plan for the outstanding hedged
6 material in March & April that all stake holders can agree to.” ECF No. 107-2 at 38. CASS
7 further stated it would “also need to have a real understanding of 2009 hedges (4 truck loads a
8 month)[,] which start April 1st[,] and planned consumption.” *Id.* The following day, PPF emailed
9 these demands and the March 6 deadline to PACCAR and forwarded this email to CASS. *Id.* at
10 48.

11 On March 6, PPF emailed CASS, informing it that “PACCAR is unwilling to sign any
12 agreement that negates the current contract that is in place or to accept any costs associated with
13 unwinding of the current hedges.” *Id.* at 50. PPF also asked whether “Alcoa intends on stopping
14 shipment if this does not get resolved[,]” stating that PPF is “concerned that PACCAR is trying
15 to call Alcoa’s bluff as to if they will stop shipping or not at the contracted price.” *Id.*

16 On March 09, PPF sent CASS the following email:

17 I received word from PACCAR and they are reluctant to sign into an agreement
18 that would accept the unwinding of the hedges for 2008-2009. It is their position
19 that PPF hold to the current contract in place and request CASS to seek relief
20 from Alcoa[,], as it seems they are the ones attempting to modify the contract
21 terms. I understand from past conversations that Alcoa was going to begin
22 invoicing for these hedges and stop shipments until a new agreement was in place.
Obviously PPF is unable to cover the cost for unwinding and stopping shipment
to us would be even more devastating. Please ask Alcoa to reconsider these
changes for all parties involved.

23 *Id.* at 56. CASS responded, asking how much aluminum PACCAR would commit to purchasing
24 per month. *Id.* at 55. PPF replied that PACCAR would not commit to purchasing a fixed quantity
25 of aluminum per month. *Id.* PPF then asked “CASS to honor the current contract in place and
26 allow PACCAR/PPF to continue the practice of moving metal forward.” *Id.* CASS did not
27 respond to this email. ECF No. 106 at 11.

28 ///

1 **5. PPF purchases aluminum from another supplier & CASS denies**
2 **threatening to stop aluminum shipments**

3 On March 12, 2009, PPF placed an aluminum order with Custom Alloy Light Metals
4 (“CALM”), one of CASS’s rival distributors.¹⁴ ECF No. 108-3 at 94. PPF continued placing
5 orders with CALM throughout 2009 and 2010, ultimately ordering 1,760,731 lbs. and 2,470,231
6 lbs. respectively. *Id.* at 9 (citing ECF No. 108-3 at 94–126; ECF No. 108-4 at 1–85). PPF alleges
7 that it began ordering from CALM in direct response to the alleged threats by Alcoa and CASS
8 to stop aluminum shipments unless PPF acceded to their demands. ECF No. 106 at 12. PPF
9 asserts that “[a]ny lapse in the delivery of aluminum to PPF would [have] cause[d] PPF to have
10 to shut down completely.” *Id.* Conversely, CASS alleges that PPF began purchasing from CALM
11 in order to take advantage of the substantially lower aluminum prices available on the “spot
12 market” due to the economic downturn. ECF No. 119 at 29.

13 On March 16, PPF informed CASS that it had placed an aluminum order with CALM.
14 *See* ECF No. 107-2 at 58–59. The following day, CASS emailed PPF, stating that

15 CASS intends to fill the existing contracts PPF placed on behalf of PACCAR for
16 the 2008 & 2009 Hedged Contracts.

17 CASS never indicated we would not ship material unless PPF stopped making
18 payments against the outstanding aging due to the large amount past due.¹⁵

19 To the contrary, if PPF would provide the shipping schedule as CASS has
20 repeatedly requested, CASS would be happy to ship the balance of the 2008
21 Hedged Contract promptly to facilitate starting the 2009 Hedged Contract on
22 time.

23

24 CASS intends to ship your metal per the 2008 & 2009 Hedged Contract until they
25 are complete unless PPF or PACCAR elects to unwind & realize the difference

26

¹⁴ While PPF placed its first order with CALM on March 12, 2009, PPF had emailed the
27 aluminum distributor as early as February 16, inquiring about the possibility of purchasing
28 aluminum from it. ECF No. 107-2 at 61–62. This email exchange took place three days after the
February 13, 2009 conference call where CASS allegedly threatened to stop shipping aluminum
to PPF. In this email exchange with CALM, PPF states that it is “running into some contract
issues with Alcoa” and that “PPF is being told that unless terms are modified that Alcoa will stop
shipments come April 1st.” *Id.* at 61.

¹⁵ CASS’s statement regarding an “amount past due” very likely refers to PPF being behind on
its payments on invoices for the purchase orders it had already placed with CASS against the
2008 sales order—the factual basis for CASS’s second claim.

1 either (positive or negative) for the material that will not be used, per [Alcoa's]
2 request.

3 *Id.* (emphasis in original).

4 PPF immediately responded, stating that CASS's "email is contradictory to what [PPF]
5 was told by CASS to ask of PACCAR." *Id.* at 58. PPF further asserted that "[o]n multiple
6 occasions, [CASS] told [PPF] of April 1st being the cut off date (stop shipment of supporting
7 alloys) if [PPF] could not get PACCAR to sign a new agreement to unwind the hedges and
8 negate the current contract in place." *Id.* CASS does not appear to have responded to this email.

9 **6. Discussion after the CALM purchase**

10 Following the disagreement over whether CASS threatened to cut off aluminum
11 shipments if PPF did not accede to its demands, the parties continued to communicate regarding
12 the status of the unused portion of the 2008 aluminum and the yet-to-be-used 2009 aluminum.
13 On April 13, 2009, CASS emailed PPF that it "need[s] a response as to where everything
14 currently stands with Paccar[.]" stating that "[t]he hedges cannot be ignored or pushed out to
15 2010." *Id.* at 79. PPF responded that it is "trying to get PACCAR engaged but they are taking the
16 stance that [PPF] push out the contract and use the metal they have purchased." *Id.* It is not clear
17 if PPF was referring to the CALM aluminum or another source.

18 In early July 2009, PPF and CASS exchanged a series of emails regarding conversations
19 between CASS's sales representative and a PACCAR representative and the possibility of CASS
20 allowing PPF to carry the 2008 and 2009 aluminum over into 2010. ECF No. 106 at 13; ECF No.
21 108 at 9; ECF No. 107-2 at 64–65. In this exchange, CASS stated and PPF confirmed that
22 PACCAR verbally agreed to PPF "passing through" the penalties¹⁶ from the 2008 and 2009 sales
23 orders to PACCAR. ECF No. 107-2 at 64.

24 However, CASS requested that PACCAR provide written confirmation of this agreement
25 and confirmation that PACCAR would "consume these hedged metal units in 2010." *Id.* PPF
26 responded that the request was not possible. It explained that PACCAR's position was that the

27
28 ¹⁶ Penalties likely refers to the price per pound carry-over penalty that PPF and CASS had
previously agreed upon.

1 sales orders at issue were contracts only between PPF and CASS and that PACCAR had not
2 agreed to purchase a certain quantity of aluminum from PPF but had rather agreed to purchase a
3 certain quantity of finished product from PPF. *Id.* There does not appear to be a response from
4 CASS regarding PACCAR's refusal to commit to purchasing the hedged aluminum.

5 Throughout the remainder of July 2009, there were a series of emails exchanged between
6 Alcoa employees regarding the situation and direct conversations with PACCAR. ECF No. 107-
7 1 at 213–20. On July 25, PACCAR's purchasing executive emailed an Alcoa vice president,
8 stating that "[i]t is PACCAR's intention to consume the aluminum currently under a fixed price
9 contract with [PPF] & [CASS] in the 2010 calendar year." *Id.* at 223.

10 **7. Discussions regarding aluminum purchases in 2010**

11 CASS emailed PPF in October 2009 to "address" the carry over of the 2008 and 2009
12 aluminum into 2010. ECF No. 108-4 at 111. After several follow-up emails, PPF responded in
13 early November, stating that it would begin consuming the aluminum in early January 2010. *Id.*
14 at 117. From December 2009 through early March 2010, CASS contacted PPF seeking an
15 answer on when PPF would begin placing orders. ECF No. 108 at 10. On March 27, PPF
16 informed CASS that it would commit to "start taking one load [of aluminum] per month . . . with
17 the possibility to take additional quantity or pay for the unused hedges" at the end of 2010. ECF
18 No. 108-4 at 128.

19 On March 29, 2010, PPF sent CASS a purchase order requesting 40,000 lbs. of aluminum
20 per month for three months, starting April 30, 2010. ECF No. 108-7 at 122. However, the price
21 per pound cited on the order was lower than the price per pound required in the 2008 sales order,
22 even without the per-month carry-over penalty. ECF No. 108 at 10. CASS responded by
23 emailing PPF the correct price and enclosing a sales order for PPF's signature. *Id.* at 11. After
24 PPF failed to return the form, CASS emailed PPF asking for an update but received no response.
25 *Id.* (citing ECF No. 108-4 at 140–41).

26 On May 19, 2010, PPF emailed CASS confirming its "intent to fulfill the contract for
27 Aluminum hedges[,]” stating that it would “consume these hedges by taking receipt of the
28 tonnage or unwinding them” ECF No. 108-4 at 144. Alcoa's sales director, who was copied

1 on this email, responded by asking if PPF would be issuing orders that day, stating that it would
2 no longer be carrying over the hedges and requesting a physical delivery schedule. *Id.* Alcoa
3 further stated that, if it did not receive an order from PPF that afternoon, it would generate an
4 invoice the following day for the cost of unwinding the hedges, plus the carry-over penalties. *Id.*

5 Apparently acceding to Alcoa's demand, PPF sent CASS a purchase order that same day
6 requesting 40,000 lbs. of aluminum per month for two months, starting June 30, 2010. ECF No.
7 108-7 at 124. The price per pound listed in the order was once again below the price fixed by the
8 2008 sales order, even without the carry-over penalty. *Id.* CASS emailed PPF on May 24,
9 confirming whether the purchase order was related to the 2008 sales order and asking how PPF
10 calculated the price per pound. ECF No. 108-4 at 148.

11 **8. Alcoa unwinds the 2008 and 2009 sales orders and invoices CASS**

12 On May 24, 2010, Alcoa invoiced CASS for \$1,041,352.60, which represented the cost
13 of unwinding the hedges for a combined 1,989,990 lbs.¹⁷ of unused aluminum from the 2008 and
14 2009 sales orders, plus the carry-over penalties. ECF No. 108 at 12.

15 That same day, CASS emailed Alcoa, stating that it had "worked with Alcoa under the
16 impression that Paccar / PPF would have until the end of the year to consume or unwind the
17 outstanding hedges." ECF No. 107-1 at 66. CASS further stated that its "understanding from
18 reading the contracts is that [CASS was] allowed to roll the hedges forward until year end and
19 would appreciate Alcoa doing so." *Id.* Alcoa responded that "there is no contract from Alcoa
20 which permits hedges to be rolled forward until year end" *Id.* at 65.

21 On June 24, 2010, CASS paid Alcoa the complete invoiced amount. ECF No. 108 at 12.
22 CASS maintains that it did so in order to preserve its credit with Alcoa. *Id.*

23 ///

24 ///

25 ¹⁷ Of the 3,060,000 lbs. of aluminum ordered under the 2008 sales order, PPF failed to purchase
26 437,094 lbs. ECF No. 108 at 5. However, CASS is only seeking recovery for 405,000 lbs. And
27 while PPF failed to purchase the entire 1,587,000 lbs. of aluminum ordered under the 2009 sales
28 orders, CASS is only seeking recovery for 1,584,990 lbs. *Id.* at 6. Thus, the 1,989,990 lbs. of
unwound aluminum represents the sum of these two lower figures.

1 **9. Continued conversations regarding the hedged aluminum**

2 On June 3, 2010, representatives for CASS and PPF met to discuss the status of the
3 unpurchased hedges, as well the unpaid invoice balance at issue in CASS’s second claim. ECF
4 No. 109 at 6. On June 16, CASS sent PPF a follow-up email. In regards to the unpurchased
5 aluminum, CASS stated that “[i]t was made clear at our last meeting . . . [that] the \$1,041,352.60
6 cost to unwind the hedges must be addressed in a repayment plan presented to PPF.” ECF No.
7 108-7 at 33. In relevant part, PPF responded on June 18, stating that “[i]t is [PPF’s] intention to
8 consume or unwind these hedges based off the contract between [PPF] and CASS. This is
9 completely independent of any agreement CASS may have with Alcoa” *Id.* at 32.

10 On August 2, 2010, PPF emailed CASS a letter stating that it sought to unwind a portion
11 of the remaining hedged aluminum. ECF No. 108-5 at 17 (citing ECF No. 108-7 at 140). CASS
12 responded by email, disputing some of PPF’s calculations. *Id.* at 17–18 (citing ECF No. 108-7 at
13 142). PPF does not appear to have immediately responded.

14 On December 30, 2010, PPF’s counsel sent a letter to CASS’s counsel. *Id.* at 18 (citing
15 ECF No. 108-7 at 146). In regards to the unpurchased aluminum, PPF again offered to unwind
16 some or all of the remaining hedges based on its calculations. *See* ECF No. 108-7 at 147. CASS
17 does not appear to have responded.

18 **B. Second breach-of-contract claim**

19 CASS’s second claim is based on the fact that PPF did not fully pay for several shipments
20 of aluminum that it purchased against the 2008 sales order. While PPF does not dispute any of
21 the facts below, it argues that the statute of limitation bars this claim.

22 Due to a history of late payments, PPF and CASS negotiated new payment terms in late
23 2008. On November 18, 2008, CASS emailed PPF, listing the terms agreed upon by both
24 companies’ CEOs. ECF No. 108-7 at 29–30. CASS would charge PPF a 12% annual interest rate
25 on invoices that were 90 days overdue after January 1, 2009, and the same rate for any invoices

26 ///

27 ///

28 ///

1 60 days overdue after June 1, 2009. *Id.* at 29. PPF confirmed these terms in its response.¹⁸ *Id.* at
2 30.

3 As discussed immediately above, CASS emailed PPF on June 16, 2010, regarding the
4 outstanding balance, which then totaled \$640,437.84. ECF No. 109 at 6. CASS asked PPF to
5 provide it a repayment plan, and, in the context of this claim, PPF responded on June 18 that it
6 would “continue to meet [its] obligations to CASS.” *Id.* (citing ECF No. 108-7 at 32).

7 A month earlier, PPF had sent CASS a check for \$5,000 as partial payment against this
8 debt. *Id.* (citing ECF No. 108-6 at 29). On July 9, 2010, PPF sent another \$5,000 partial
9 payment. *Id.* (citing ECF No. 108-6 at 30). These were the last payments PPF ever sent CASS.
10 *Id.* at 7.

11 **C. Procedural history**

12 CASS filed suit in this court on December 23, 2013. ECF No. 1. The second amended
13 complaint (“SAC”) is the operative complaint in this action (ECF No. 51), and after the court
14 partially granted PPF’s last motion to dismiss (ECF No. 52), the following claims remain: (1)
15 first breach-of-contract claim; (2) second breach-of-contract claim; (3) breach of the implied
16 covenant of good faith and fair dealing; (4) quantum meruit; and (5) unjust enrichment. *See* ECF
17 No. 62 (dismissing CASS’s account-stated claim with prejudice).

18 On March 6, 2017, the court held a hearing on the instant motions for summary
19 judgment.

20 **II. Motions for summary judgment**

21 Both parties have moved for summary judgment on CASS’s two breach-of-contract
22 claims. Because their arguments are largely overlapping, the court will simultaneously address
23 both parties’ motions regarding these claims. The court will also address PPF’s laches and
24 estoppel defenses regarding both claims, as well as the remainder of its summary-judgment
25 motion regarding CASS’s remaining claims: quantum meruit, unjust enrichment, and breach of
26 the implied covenant of good faith and fair dealing.

27
28 ¹⁸ As discussed above, CASS makes no mention throughout this second claim of a “weekly
payment plan” for PPF. *See supra* § I.A.3.

1 **A. Legal standard**

2 Summary judgment is appropriate only when “the pleadings, depositions, answers to
3 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
4 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter
5 of law.” Fed. R. Civ. P. 56(c). In assessing a motion for summary judgment, the evidence,
6 together with all inferences that can reasonably be drawn therefrom, must be read in the light
7 most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio*
8 *Corp.*, 475 U.S. 574, 587 (1986); *Cty of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154
9 (9th Cir. 2001).

10 The moving party bears the burden of informing the court of the basis for its motion,
11 along with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v.*
12 *Catrett*, 477 U.S. 317, 323 (1986). On those issues for which it bears the burden of proof, the
13 moving party must make a showing that is “sufficient for the court to hold that no reasonable
14 trier of fact could find other than for the moving party.” *Calderone v. United States*, 799 F.2d
15 254, 259 (6th Cir. 1986); *see also Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1141 (C.D.
16 Cal. 2001).

17 To successfully rebut a motion for summary judgment, the non-moving party must point
18 to facts supported by the record that demonstrate a genuine issue of material fact. *Reese v.*
19 *Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000). A “material fact” is a fact “that might
20 affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477
21 U.S. 242, 248 (1986). Where reasonable minds could differ on the material facts at issue,
22 summary judgment is not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A
23 dispute regarding a material fact is considered genuine “if the evidence is such that a reasonable
24 jury could return a verdict for the nonmoving party.” *Liberty Lobby*, 477 U.S. at 248. The mere
25 existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient to
26 establish a genuine dispute; there must be evidence on which the jury could reasonably find for
27 the plaintiff. *See id.* at 252.

28 ///

1 **B. Applicable law**

2 CASS argues that Nevada law applies to this case. ECF No. 109 at 9. However, CASS
3 analyzes at least portions of its claims under Nevada common law and Nevada’s codification of
4 the Uniform Commercial Code (“UCC”), as well as California common law and its UCC.
5 Conversely, PPF argues that the UCC applies, but it does not cite to a specific state’s codification
6 of UCC Article 2. *See* ECF No. 116 at 5.

7 Because the court is sitting in diversity, it must apply the forum state’s choice-of-law
8 rules. *Cleary v. News Corp.*, 30 F.3d 1255, 1265 (9th Cir. 1994). “Nevada employs the
9 ‘substantial relationship’ test for determining what state’s law applies in a contract case.” *Tyson*
10 *v. Mid-Century Ins. Co.*, No. 2:11-CV-00199-MMD, 2013 WL 690865, at *2 (D. Nev. Feb. 22,
11 2013) (citing *Consol. Generator–Nev., Inc. v. Cummins Engine Co., Inc.*, 971 P.2d 1251, 1253
12 (Nev. 1998)). This test considers five factors: “(1) the place of contracting; (2) the place of
13 negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of
14 the contract; and (5) the domicile, residence, nationality, place of incorporation and place of
15 business of the parties.” *Id.* (citing *Consol. Generator–Nev.*, 971 P.2d at 1253–54). Additionally,
16 the application of the state’s law must not violate “a strong public policy of Nevada.” *Consol.*
17 *Generator–Nev.*, 971 P.2d at 1254.

18 Here, the contracts at issue were negotiated and executed in Nevada, and the aluminum
19 was shipped to PPF in Nevada. ECF No. 109 at 8–9. While CASS is a California corporation,
20 PPF is a Nevada corporation that operates in Nevada. Because almost all considerations weigh in
21 favor of Nevada law, the court will apply it.

22 The next issue is what form of Nevada contract law applies: the state’s common law or its
23 codification of UCC Article 2. The latter applies to the sale of goods, NRS 104.2102, which
24 Nevada’s UCC defines as “all things (including specially manufactured goods) which are
25 movable . . . other than the money in which the price is to be paid, investment securities (Article
26 8) and things in action.” Nev. Rev. Stat. § 104.2105. During the hearing, PPF argued that the
27 contracts at issue dealt solely with the sale of aluminum, which is a good. PPF has also argued
28 that the sales orders included a choice-of-law provision, which selected the UCC. ECF No. 116

1 at 5. However, the sales orders mistakenly stated that any “dispute will be subject to the
2 *Universal* Commercial Code (UCC)” rather than the *Uniform* Commercial Code. *E.g.*, ECF No.
3 107-1 at 9. Conversely, CASS argued during the hearing that, because the sales orders involved
4 forming a hedge for aluminum that was yet to be delivered, the sales orders did not truly deal
5 with the sale of goods.

6 The court finds CASS’s argument unavailing. While both parties were aware that CASS
7 would need to enter into a hedge arrangement in order to guarantee PPF a fixed price of
8 aluminum, the parties entered into the contracts in order for CASS to sell aluminum to PPF. All
9 of the material terms deal with that sole issue: the buying and selling of aluminum. Nevada’s
10 UCC therefore applies to this action.

11 **C. Count 1: first contract claim (failure to order hedged aluminum)**

12 This first claim collectively addresses the alleged breach of seven different contracts: the
13 consolidated version of sales order 17675 that originally called for aluminum delivery starting in
14 2008 (i.e., the “2008 sales order”), and the five separate sales orders and one email-based order
15 that called for aluminum delivery starting in 2009 (i.e., the “2009 sales orders”). Both parties
16 have moved for summary judgment on this claim. PPF argues that the claim is barred by the
17 statute of limitations and that, even if this were not the case, it did not breach the sales orders.

18 As discussed in detail below, the court ultimately finds that genuine disputes of material
19 fact exist and that it must therefore deny both parties summary judgment. One such dispute
20 results from the fact that neither party has provided a clear version of what they believe the final
21 terms of the 2008 sales order were. There appears to be a dispute as to whether, pursuant to the
22 modification¹⁹ of the 2008 sales order during mid-2009, PPF was allowed to carry over the 2008
23 aluminum at a penalty until the end of 2009 or only until the end of February 2009. *See supra* §
24 I.A.1. Moreover, PPF claims that CASS repudiated the 2008 sales order in February 2009—an
25 issue discussed in more detail below—but both parties continued to negotiate over this contract

26
27 ¹⁹ The parties do not dispute that the agreement in mid-2008 to allow CASS to carry over the
28 2008 aluminum into at least some portion of 2009 at a penalty was a valid contract modification.
Unlike the traditional common-law rule, “an agreement modifying a contract . . . needs no
consideration to be binding” under the UCC. Nev. Rev. Stat. § 104.2209.

1 during mid-2009. The record appears to establish that both parties—along with Alcoa and
2 PACCAR—reached a consensus that PPF would be allowed to purchase the 2008 aluminum,
3 along with the 2009 aluminum, in 2010 and that CASS was clearly expecting PPF to place orders
4 against the 2008 sales order throughout 2010. *See supra* § I.A.6–7.

5 While it appears to the court that these undisputed facts establish that the parties modified
6 the 2008 sales order in mid-2009 to allow for PPF to carry over the 2008 aluminum into 2010,
7 neither party has addressed this issue in their briefings. And neither party provided illumination
8 on this issue during the hearing when the court asked what each party’s understanding was as to
9 how long PPF could continue to carry over the 2008 aluminum. As demonstrated below, this
10 unresolved factual question prevents the court from ascertaining when PPF breached, if ever, the
11 2008 sales order, which is critical to both the statute of limitations and the claim’s merits.

12 And although this specific issue does not affect the 2009 sales orders, it is also unclear to
13 the court whether, after Alcoa unwound the contracts, CASS refused to allow PPF to place
14 orders against the 2008 and 2009 sales orders and thus potentially repudiated these contracts.
15 Summary judgment is thus unwarranted for either party on this first claim.

16 Before addressing the claim’s merits, the court will address the defenses that PPF has
17 raised.

18 **1. Statute of limitations**

19 The statute of limitations under Nevada’s UCC is “4 years after the cause of action has
20 accrued.” Nev. Rev. Stat. § 104.2725. “A cause of action accrues when the breach occurs,
21 regardless of the aggrieved party’s lack of knowledge of the breach.” *Id.* CASS filed its claim in
22 this court on December 23, 2013.

23 PPF argues that the statute of limitations would have begun to run for the 2008 sales
24 order at the end of 2008, asserting that CASS alleges that PPF breached this contract by not
25 purchasing the contracted aluminum by the end of that year. ECF No. 107 at 19. PPF similarly
26 argues that the statute of limitations would have begun to run at the end of 2009.²⁰ *Id.* at 20.

27
28 ²⁰ More specifically, PPF argues that CASS has alleged nine successive breaches for the 2009
sales orders, which occurred the first of each month from April 1, 2009 to December 1, 2009.

1 However, this argument mischaracterizes CASS's allegations. CASS has always acknowledged
2 that the modification of the 2008 sales order allowed PPF to carry over the unused aluminum
3 from this contract into at least some portion of 2009. CASS has similarly acknowledged that the
4 2009 sales orders explicitly allowed for carry over into 2010.

5 Instead, CASS argues that the statute of limitations could not have begun to run until
6 June 2010, when it paid Alcoa for the cost of unwinding the 2008 and 2009 sales orders. ECF
7 No. 118 at 6. In making this argument, CASS focuses solely on when it incurred damages from
8 the alleged breach; however, CASS never makes clear when it believes that PPF breached any of
9 the sales orders. This is partially a result of the fact that neither party has clarified whether the
10 2008 sales order was modified a second time in mid-2009 to allow PPF to carry over the unused
11 2008 aluminum into 2010.

12 Regardless, in either possible scenario, CASS's claim regarding the 2008 sales order falls
13 within the UCC's four-year statute of limitations. If the 2008 sales order was *not* modified to
14 allow for 2010 carry over—and thus only allowed for carry over of 2008 aluminum into 2009—
15 then the contract was allegedly breached on January 1, 2010. Similarly, if the contract was
16 modified to allow for 2010 carry over of 2008 aluminum, then the alleged breach only occurred
17 on January 1, 2011, and CASS's claim is also within the four-year window.

18 As for the 2009 sales orders, the contracts explicitly allowed PPF to carry over any
19 unused portion of the 2009 aluminum into 2010 at a penalty. Although acknowledging the
20 similar provision in the 2008 sales order for carry over of the 2008 aluminum into 2009, CASS
21 seems to ignore—at least in certain points in its briefing—this explicit provision in the 2009
22 sales orders. *E.g.*, ECF No. 108 at 15. CASS thus argues that the 2009 sales orders were
23 breached when PPF “failed to take the aluminum during the 2nd-4th quarters of 2009” *Id.*
24 But because there is no genuine dispute that PPF was allowed to carry over the 2009 aluminum
25

26 ECF No. 108 at 207. PPF cites to a CASS spreadsheet that divides the total amount of unordered
27 2008 aluminum evenly per month for April through December 2009. ECF No. 51-7 at 2. This
28 spreadsheet has no context, so PPF's argument is unclear. However, CASS has never alleged or
argued that there were separate breaches of the 2009 sales orders.

1 into 2010, the statute of limitations only began to run on the 2009 sales orders after 2010.
2 CASS's claim for these sales orders thus falls within the statute of limitations.

3 **2. Breach of contract**

4 CASS argues that PPF breached the 2008 sales order by failing to order the 2008
5 aluminum during 2008 or 2009 and breached the 2009 sales orders by failing to order the 2009
6 aluminum during 2009 or 2010. ECF No. 108 at 15–16. CASS further argues the PPF breached
7 both sets of contracts by failing to pay the penalties on carrying over the 2008 and 2009
8 aluminum past 2008 and 2009 respectively, failing “to provide a schedule for delivery in 2010,”
9 and failing “to take the aluminum in 2010” *Id.* PPF responds that CASS repudiated the
10 contracts by conditioning continued aluminum delivery on PPF acceding to additional contract
11 terms. PPF also argues that the unwinding costs that CASS paid to Alcoa are consequential
12 damages, which are not granted to sellers under the UCC, and that PPF is thus not liable to
13 CASS. The court will address these two arguments before analyzing whether PPF breached the
14 contracts.

15 **a. Repudiation in February of 2009**

16 PPF has consistently asserted throughout the briefings that CASS repudiated the contracts
17 during the February 2009 conference call when CASS demanded that PPF convince PACCAR to
18 sign contracts agreeing to immediately purchase or unwind the 2008 aluminum and modify the
19 carry-over provision in the 2009 sales orders. ECF No. 115 at 22. A repudiation is “[a]
20 contracting party’s words or actions that indicate an intention not to perform the contract in the
21 future.” REPUDIATION, Black’s Law Dictionary (10th ed. 2014). “When either party
22 repudiates the contract with respect to a performance not yet due[,] the loss of which will
23 substantially impair the value of the contract to the other, the aggrieved party may . . . suspend
24 his or her own performance” or “[r]esort to any remedy for breach” Nev. Rev. Stat. §
25 104.2610 (codifying U.C.C. § 2-610).

26 A party’s demand “for more than the contract calls for in the way of counter-performance
27 is not in itself repudiation. . . . However, when under a fair reading it amounts to a statement of
28 intention not to perform except on conditions which go beyond the contract, it becomes a

1 repudiation.” U.C.C. § 2-610 (comment 2) (Unif. Law Comm’n); *see also* Restatement (Second)
2 of Contracts § 250 (comment 2) (Am. Law Inst. 1981).

3 PPF’s argument fails to establish that it is entitled to summary judgment for several
4 reasons. First, there is clearly a genuine dispute of fact as to whether CASS presented these
5 demands as an ultimatum. Contrary to PPF’s version of events, CASS asserts that it conditioned
6 continued aluminum shipments on PPF’s continued payment on the balances for overdue
7 invoices. Thus, even if this anticipatory-repudiation defense could potentially excuse an alleged
8 breach, the defense is not appropriate for summary judgment.

9 Moreover, even if CASS had conditioned its performance on PPF and PACCAR
10 acceding to its demands, it is not clear how the parties’ conduct after early 2009 affected PPF’s
11 obligation to purchase the aluminum under the 2008 and 2009 sales orders. While neither party
12 addresses this point, it is possible that CASS retracted its alleged repudiation—assuming it even
13 occurred—by communicating to PPF in March 2009 that it never threatened to stop shipping
14 aluminum over its contract demands and continuing to request that PPF place aluminum orders.
15 *See Nev. Rev. Stat. § 104.2611* (“Until the repudiating party’s next performance is due[,] the
16 repudiating party can retract his or her repudiation unless the aggrieved party has since the
17 repudiation cancelled or materially changed his or her position . . .”).

18 While PPF argues that, even after the March 2009 emails, CASS continued to make
19 demands of PPF, it appears that there was a consensus by July of that year that PPF would
20 continue to purchase the 2008 aluminum throughout 2009 and possibly into 2010. Thus, PPF has
21 failed to show that the undisputed facts establish that CASS repudiated the 2008 sales order
22 during the February 2009 conference call and failed to timely retract that repudiation.

23 **b. Consequential damages**

24 PPF also argues that CASS has failed to establish the damages element in this breach-of-
25 contract claim because the unwinding costs that Alcoa incurred—and thus charged CASS for—
26 are consequential damages, which are not recoverable by *sellers* under the UCC. *See Associated*
27 *Metals & Minerals Corp. v. Sharon Steel Corp.*, 590 F. Supp. 18, 21 (S.D.N.Y. 1983) (“It is . . .
28 well settled that the UCC does not provide the remedy of consequential damages for aggrieved

1 sellers.”); *see also* Nev. Rev. Stat. § 104.1305 (not allowing for consequential damages “except
2 as specifically provided in the Uniform Commercial Code or by other rule of law.”).

3 Under the UCC, consequential damages include “[a]ny loss resulting from general or
4 particular requirements and needs of which the seller at the time of contracting had reason to
5 know and which could not reasonably be prevented by cover or otherwise” Nev. Rev. Stat.
6 § 104.2715(2); *see also* 11 Joseph M. Perillo, *Corbin on Contracts* §§ 60.16, .19 (Joseph M.
7 Perillo, ed.) (Matthew Bender). In contrast, the UCC’s standard measure of damages for a seller
8 when the buyer fails to pay for the contracted goods “is the difference between the market price
9 at the time and place for tender and the unpaid contract price.” Nev. Rev. Stat. § 104.2708(1).

10 Here, the damages that CASS incurred was the cost of unwinding the hedges, which even
11 PPF defines as the difference between the metal’s contract price and its market price at the time
12 of the contract’s rescission. ECF No. 106 at 8. The court finds that these costs are not
13 consequential damages but rather the standard measure of compensatory damages for an
14 aggrieved seller under the UCC. If a buyer such as PPF fails to purchase a contracted quantity of
15 a good and the good’s market (i.e., spot) price falls below the contracted fixed price, a seller such
16 as CASS could only mitigate its damages by selling the good to another buyer at the market
17 price. CASS argues that this is precisely the damages the unwinding costs represent. ECF No.
18 118 at 27–28.

19 The court agrees. Moreover, the fact that Alcoa was the entity that initially incurred this
20 cost and then passed it on to CASS as the intermediary re-seller does not alter this analysis on the
21 *nature* of CASS’s damages.

22 However, because both parties are being denied summary judgment on this claim, the
23 court makes no finding as to whether the \$1,041,352.60 that Alcoa invoiced CASS is the correct
24 *amount* of CASS’s damages. For example, as discussed below, it is possible that PPF breached
25 the 2008 and 2009 sales orders at the end of 2010 by failing to purchase the remaining aluminum
26 by the year’s end. Under this scenario, the correct measure of damages may be the contract price
27 minus the market price at that point in time.

28 ///

1 **c. Alleged breach of the sales orders**

2 Neither party has provided a clear, complete narrative of events or a clear understanding
3 of their respective positions on key factual and legal issues. The court has therefore blended the
4 narrative from both parties' summary-judgment motions and bridged some gaps with a thorough
5 review of the record. Based on this review, the court distills the parties' arguments into two
6 conflicting narratives. PPF contends that it did not breach either the 2008 or 2009 sales orders
7 because CASS repudiated these contracts when CASS demanded that PPF reimburse it for the
8 unwinding costs that it had paid to Alcoa. *See, e.g.*, ECF No. 115 at 16. Conversely, CASS
9 contends that PPF breached the sales orders by not ordering the remainder of the hedged
10 aluminum by the end of 2010 and not paying the carry-over penalties. *See, e.g.*, ECF No. 108 at
11 13.

12 These arguments are based on two issues that are either disputed or unclear: (1) whether
13 CASS, by asking PPF to reimburse it for the unwinding costs it had paid to Alcoa, was refusing
14 to continue shipping aluminum to PPF for the remainder of 2010 and (2) whether, as discussed
15 above, the 2008 sales order had been modified to allow PPF to carry over the 2008 aluminum
16 beyond 2009 and into 2010 (similar to the 2009 sales orders).

17 Turning to the first point, PPF contends that, once Alcoa unwound its hedged contracts,
18 CASS demanded payment from PPF for its damages and denied PPF the opportunity to place
19 aluminum orders for the remainder of 2010. *See, e.g.*, ECF No. 115 at 16–17 (“Again, the
20 unwinding of the hedges meant that the metal would not be delivered. . . . CASS’ . . .
21 assertion . . . that it remained willing to ship aluminum to PPF is absurd.”). If the undisputed
22 facts demonstrated this to be true, then CASS would have repudiated the 2009 sales orders
23 because their explicit terms allowed CASS to carry over this order into the end of 2010.²¹ Under
24 this scenario, at the time that Alcoa unwound the hedges and CASS demanded reimbursement,
25 PPF was contractually entitled to approximately seven more months to purchase as much of the
26

27 ²¹ CASS has not presented evidence or even asserted that PPF was not contractually entitled to
28 carry over the 2009 aluminum until the *end* of 2010.

1 remaining aluminum as possible. By preventing PPF from performing, CASS would be the
2 breaching party.

3 But turning to the second point, there is another layer of disputed facts regarding the 2008
4 sales order. As discussed above, it is unclear to the court whether the parties, pursuant to their
5 conversations during June through July of 2009, expected PPF to finish purchasing the 2008
6 aluminum by the end of December 2009 or by the end of December 2010. This term is material
7 because, like the 2009 sales orders, CASS would have repudiated the 2008 sales order if (1) PPF
8 was contractually entitled to carry over the 2008 aluminum until the end of 2010 at a penalty and
9 (2) CASS refused to allow PPF to purchase aluminum after Alcoa's unwinding.

10 Nonetheless, CASS disputes the assertion that it refused to continue shipping aluminum
11 to PPF after the unwinding,²² and the record does not exclude either version of events. For
12 example, in the email exchange during June 2010 following the meeting between CASS and PPF
13 representatives (*see supra* § I.A.9), the parties appear to have been operating under different
14 expectations. By asking for reimbursement of the unwinding costs, CASS does not appear to
15 have contemplated continuing to ship aluminum to PPF; rather, it appears that CASS expected
16 payment for the full measure of damages (i.e., contract price minus the market price) that Alcoa
17 passed on to CASS. However, PPF responded by committing to continue purchasing or
18 unwinding the remaining aluminum. PPF also follows up on this commitment by offering to
19 unwind part or all of the hedges in August and December of 2010.

20 Conversely, the record does *not* establish that CASS was unwilling to continue selling
21 aluminum to PPF throughout the remainder of 2010. After all, CASS responded to PPF's August
22 letter regarding unwinding by providing unwinding-cost calculations that PPF later disputed in
23 its December correspondence. Further compounding the lack of clarity regarding these
24 communications, neither party has explained what unwinding the hedges would entail after
25

26 ²² For example, CASS asserts that, "[b]y paying the \$1,041,252.60 invoice, CASS remained
27 positioned to continue to order from Alcoa in the future and maintain its business relationship
28 with this key supplier. CASS never stated to PPF that it would not ship the aluminum to PPF
pursuant to the 2008 and 2009 Sales Orders' terms." ECF No. 108 at 12–13 (internal citation
omitted).

1 Alcoa had already unwound its contracts with CASS. One possible interpretation of these
2 communications is that CASS would buy other aluminum from Alcoa or another supplier at the
3 spot-market rate and continue selling it to PPF at the contracted prices plus penalties that the
4 sales orders established. But neither party has provided illumination on this issue, and it is
5 improper for the court to make such critical assumptions at the summary-judgment stage.

6 In summation, because the record is unclear and does not eliminate the possibilities that
7 PPF breached the sales orders or alternatively that CASS repudiated them, both parties have
8 failed to demonstrate that they are entitled to judgment as a matter of law on this claim. The
9 court will therefore deny both parties summary judgment on CASS's first contract claim.

10 **D. Count 2: second contract claim (failure to pay for ordered aluminum)**

11 CASS claims that PPF failed to pay the balance for ten invoices stemming from ten
12 separate orders that PPF placed and received under the 2008 sales order between November 2008
13 and March 2009.²³ CASS asserts that the total unpaid balance on these invoices is \$625,427.84,
14 which PPF does not dispute. Instead, PPF argues that the 2008 sales order was an installment
15 contract and that, because payment was due on each invoice within thirty days of each order,
16 PPF's non-payment resulted in multiple breaches that began to run between December 2008 and
17 April 2009. PPF argues that CASS's claim, which was filed in this court in December 2013,
18 would therefore be barred by the UCC's four-year statute of limitations.

19 Conversely, CASS argues that the 2008 sales order is not an installment contract and that
20 the statute of limitations only began to run in mid-2010 when PPF affirmed that it was
21 committed to paying off its debt but made only one final payment in July 2010. CASS
22 alternatively argues that, even if the sales order is an installment contract, both PPF's
23 acknowledgement of its debt and the partial payments it made until mid-2010 tolled the statute of
24 limitations.

25 ///

26
27 ²³ CASS has provided a table of these unpaid invoices. ECF No. 109 at 7. It appears that PPF
28 only made payments on the first invoice, with over \$35,000 of a \$63,000 order remaining
unpaid. *Id.* The combined amount unpaid for these ten invoices is \$625,437.84. *Id.* PPF does not
dispute any of these figures.

1 Finally, PPF argues that, even if the statute of limitations does not bar CASS's claim,
2 PPF is not liable for the contractual interest on the unpaid balance because CASS has failed to
3 allege facts underlying the claim.

4 Both parties have moved for summary judgment on this second breach-of-contract claim.

5 **1. PPF's acknowledgment of its debt**

6 Nevada recognizes the common-law rule that a written "promise to pay all or part of an
7 antecedent contractual . . . indebtedness owed by the promisor is binding if the indebtedness is
8 still enforceable or would be except for the effect of a statute of limitations." Restatement
9 (Second) of Contracts § 82 (Am. Law Inst. 1981); *see also* Nev. Rev. Stat. § 11.390 (requiring
10 that an "acknowledgement or promise" used as "evidence of a new or continuing contract . . . be
11 contained in some writing signed by the party to be charged"); *Saye v. Paradise Mem'l Gardens,*
12 *Inc.*, 554 P.2d 274, 275 (Nev. 1976) (addressing a party's argument that the statute of limitations
13 "was tolled, pursuant to NRS 11.390, by an acknowledgement in the form of an affidavit signed
14 by [the] respondent's president."). And contrary to PPF's contention at the hearing, this
15 common-law rule applies to a UCC contract because Article 2 explicitly "does not alter the law
16 on tolling of the statute of limitations" Nev. Rev. Stat. § 104.2725.

17 PPF has alternatively argued that its email does not serve as an acknowledgement of a
18 debt because an acknowledgment must "directly, distinctly and unqualifiedly admit a willingness
19 or intent to pay a specified debt." ECF No. 116 at 17 (citing *Saye*, 554 P.2d at 275). It contends
20 that its email to CASS²⁴ does not meet this standard because there is no indication of what PPF's
21 position is or what PPF considered its obligation to be. *Id.* CASS counters that PPF's statement
22 about meeting its obligations to CASS does demonstrate a direct acknowledgement of a specific
23 debt because PPF made the statement in response to CASS's email regarding the \$640,437.84²⁵

24 ²⁴ PPF argues that its email is inadmissible under Federal Rule of Evidence 408(2) (ECF No.
25 116 at 16), which it also raises in its motion to strike. The court addresses this issue below and
26 finds that the email is admissible.

27 ²⁵ Attempting to further argue that its acknowledgment of its debt was too unspecified, PPF
28 highlights the fact that the amount cited in CASS's original email, \$640,437.84, is different than
the amount that PPF alleged in its complaint: \$625,437.84. ECF No. 116 at 17–18. CASS
counters that the amount cited in its email had not yet taken into account \$15,000 in combined

1 unpaid invoice balance. ECF No. 108-7 at 33 (CASS stating, “It was made very clear at our last
2 meeting both the \$640,437.84[,] which is now due[,] and the \$1,041,352.60 cost to unwind the
3 hedges must be addressed in a repayment plan presented to PPF.”).

4 The court agrees with CASS. When the conversation between CASS and PPF is
5 considered as a whole, it is clear that PPF is acknowledging the unpaid invoice debt and
6 committing to pay it off. This email therefore serves as a written acknowledgment of a debt, and
7 the statute of limitations is renewed from this date. CASS’s second breach-of-contract claim is
8 therefore timely, and the court need not address whether the sales order is a divisible contract or
9 whether PPF’s partial payments separately tolled the statute of limitations.

10 However, the court will address PPF’s final argument that CASS failed to allege tolling
11 in its operative complaint and is thus barred from now relying on it. CASS cites *Wasco*
12 *Products., Inc. v. Southwall Technologies., Inc.* for the proposition that “federal courts have
13 repeatedly held that plaintiffs seeking to toll the statute of limitations on various grounds must
14 have included the allegation in their pleadings” 435 F.3d 989, 991 (9th Cir. 2006).
15 However, the Ninth Circuit in *Wasco Products* only addressed the narrow issue of whether the
16 plaintiff, who sought to toll the statute of limitations under a civil-conspiracy theory, was
17 required to plead civil conspiracy in its complaint. *Id.* at 989. Thus, it was the plaintiff’s failure
18 to plead the claim—rather than plead tolling itself—that barred its tolling argument.

19 Here, CASS pled the existence of the June 18, 2010 email in its operative complaint and
20 asserted that “PPF acknowledged its agreement to pay CASS for the outstanding invoices”
21 ECF No. 51 at 8. CASS is therefore not barred from arguing that the email acknowledgement
22 renewed the statute of limitations. Accordingly, the court will grant CASS and deny PPF
23 summary judgment on CASS’s claim for the principal balance of the aluminum that PPF ordered
24 but failed to pay for.

25 ///

26
27
28 final payments from PPF, which would bring the total debt owed, minus interest, down to
\$625,437.84. ECF No. 127 at 9–10. In turn, the higher debt amount cited in CASS’s email does
not affect whether PPF’s response serves as an acknowledgement of its debt.

1 **2. Contractual interest on unpaid invoices**

2 Based on the modification of the 2008 sales order’s payment terms during November
3 2008 (*see supra* § II.B), CASS claims that PPF is liable at the rate of 12% interest for the unpaid
4 invoices.²⁶ PPF responds that CASS’s failure to plead the contract modification and the related
5 interest bars CASS from seeking the 12% contractual interest. CASS has not responded to this
6 argument.

7 “Federal Rule of Civil Procedure 8(a)(2) requires that the allegations in the complaint
8 ‘give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it
9 rests.’” *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006) (quoting
10 *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002)). Failure to give such notice can
11 prejudice the defendant because “[a] complaint guides the parties’ discovery, putting the
12 defendant on notice of the evidence it needs to adduce in order to defend against the plaintiff’s
13 allegations.” *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000). Courts
14 consistently reject a plaintiff’s attempt to raise new claims or theories of liability at the
15 summary-judgment stage because, “[s]imply put, summary judgment is not a procedural second
16 chance to flesh out inadequate pleadings.” *Wasco Prod.*, 435 F.3d at 992 (quoting *Fleming v.*
17 *Lind–Waldock & Co.*, 922 F.2d 20, 24 (1st Cir. 1990)); *see, e.g., Nolan v. Vilsack*, No. CV-
18 1408113-ABF-FMX, 2016 WL 3678992, at *4 (C.D. Cal. June 30, 2016); *Phillips v. Target*
19 *Corp.*, No. 2:14-CV-468-JCM-CWH, 2015 WL 4622673, at *4 (D. Nev. July 31, 2015).

20 Here, CASS did not plead the existence of the November 18, 2008 email in which the
21 parties agreed to PPF paying 12% interest on any invoice balance unpaid beyond a certain time.
22 By failing to allege these facts, CASS failed to give PPF notice that it was intending to seek this
23 interest, thus likely prejudicing PPF. Accordingly, CASS will be barred from seeking contractual
24 interest on the unpaid invoice balance.

25 ///

26
27 _____
28 ²⁶ Specifically, CASS asserts that “the interest owed, calculated from the day following the
payment due date on each invoice through December 31, 2015 is \$485,051.77” and that “[t]he
interest accrued daily for the combined invoices in 2016 is \$199.99.” ECF No. 109 at 7.

1 PPF, however, has not disputed that CASS is entitled to *statutory* pre-judgment interest
2 on this claim, and the court finds that CASS would be entitled to such interest. *See Schoepe v.*
3 *Pac. Silver Corp.*, 893 P.2d 388, 389 (Nev. 1995) (“[P]rejudgment interest is recoverable as a
4 matter of right in actions upon contracts for all money from the time it becomes due.”).

5 **E. Laches and estoppel on the first and second breach-of-contract claims**

6 In response to CASS’s motions for summary judgment on its first and second breach-of-
7 contract claims, PPF briefly argues that the equitable defenses of laches and estoppel apply and
8 create genuine disputes of material fact. ECF No. 115 at 29; ECF No. 116 at 21–22. “Laches is
9 an equitable doctrine which may be invoked when delay by one party works to the disadvantage
10 of the other, causing a change of circumstances which would make the grant of relief to the
11 delaying party inequitable.” *Miller v. Burk*, 188 P.3d 1112, 1125 (Nev. 2008) (citation and
12 quotation marks omitted). In determining whether the defense applies, Nevada courts consider
13 “(1) whether the party inexcusably delayed bringing the challenge, (2) whether the party’s
14 inexcusable delay constitutes acquiescence to the condition the party is challenging, and (3)
15 whether the inexcusable delay was prejudicial to others.” *Id.*

16 PPF argues that it is prejudiced by CASS’s delay in bringing suit because (1) the contract
17 at issue was executed in 2007 and there are allegedly no documents regarding its formation; (2)
18 the PPF employees involved in the contract negotiations, Ray Switzer and Lono Hagman, are no
19 longer employed at the company; and (3) PPF was financially impacted when it carried the debt
20 as a liability until August 2013, at which point it reported the amount as income.

21 These arguments are unavailing. While PPF asserts that it has no documents regarding
22 the formation of the 2008 sales order, it has provided emails regarding the relevant modification
23 of the contract in mid-2008 and has not highlighted what specific facts about the contract
24 formation PPF is now unable to prove. In regards to the two employees, CASS counters that both
25 parties deposed Switzer in June 2015 and that PPF originally noticed and then cancelled Lono
26 Hagman’s deposition. ECF No. 127 at 19. Finally, CASS argues that any tax liability that PPF
27 incurred cannot be considered prejudice because (1) PPF could have simply paid off the debt and
28

1 (2) PPF received over \$625,000 in goods that it did not pay for. The court agrees with CASS and
2 finds that PPF's laches defense is inapplicable.

3 In regards to estoppel, PPF has not cited any legal authority or facts as to why this
4 equitable defense applies. Because PPF has the burden of establishing an affirmative defense,
5 this alone precludes relief. Moreover, the court cannot identify any facts that justify the
6 doctrine's application. In order to establish estoppel, a party must prove, inter alia, that it "relied
7 to [its] detriment on the conduct of the party to be estopped." *Mahban v. MGM Grand Hotels,*
8 *Inc.*, 691 P.2d 421, 423 (Nev. 1984). PPF has not alleged any conduct that satisfies this element.
9 Therefore, PPF's laches defense is also inapplicable.

10 **F. Count 4: breach of the implied covenant of good faith and fair dealing**

11 PPF has moved for summary judgment on this claim. "It is well established that all
12 contracts impose upon the parties an implied covenant of good faith and fair dealing, which
13 prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other." *Nelson*
14 *v. Heer*, 163 P.3d 420, 427 (Nev. 2007); *see also* Nev. Rev. Stat. § 104.1304 ("Every contract or
15 duty within the Uniform Commercial Code imposes an obligation of good faith in its
16 performance and enforcement."). Where one party to a contract "deliberately contravenes the
17 intention and spirit of the contract, that party can incur liability for breach of the implied
18 covenant of good faith and fair dealing." *Hilton Hotels v. Butch Lewis Prods.*, 808 P.2d 919, 923
19 (Nev. 1991).

20 To succeed on a claim for breach of the implied covenant, a plaintiff must (1) identify the
21 contract that is the basis for the claim, (2) identify the conduct that allegedly constituted the
22 breach of the covenant, (3) indicate that this conduct was deliberate, and (4) show how the
23 alleged breach caused damage. *See Morris v. Bank of Am. Nev.*, 886 P.2d 454, 457 (Nev. 1994).
24 A defendant can be liable for breach of the implied covenant even if it is determined that the
25 defendant did not breach the underlying contract. *Id.* at 457 n. 2 ("Whether a breach of the letter
26 of the contract exists or not, the implied covenant of good faith is an obligation independent of
27 the consensual contractual covenants.").

28 ///

1 “[G]ood faith is a question of fact.” *Consol. Generator–Nev*, 971 P.2d at 1256. However,
2 “when there is no factual basis for concluding that [a defendant] acted in bad faith, a court may
3 determine the issue of bad faith as a matter of law.” *Andrew v. Century Sur. Co.*, No. 2:12–cv–
4 0978, 2014 WL 1764740, at *10 (D. Nev. Apr. 29, 2014) (citing *Am. Excess Ins. Co. v. MGM*
5 *Grand Hotels, Inc.*, 729 P.2d 1352, 1355 (Nev. 1986)).

6 CASS alleges in its operative complaint that PPF breached the implied covenant by
7 failing to purchase the full amount of aluminum that it ordered under the 2008 and 2009 sales
8 orders. ECF No. 51 at 10. It further argues in its response to PPF’s summary-judgment motion
9 that PPF breached the covenant by purchasing aluminum from CALM instead of from CASS
10 under the 2008 sales order. ECF No. 118 at 29. CASS asserts that PPF saved 1.5 million dollars
11 by purchasing aluminum from CALM through the spot market at a rate lower than the price fixed
12 under the hedges. *Id.* Conversely, PPF argues that CASS itself breached the implied covenant by
13 threatening to discontinue shipping aluminum if PPF did not accede to modifying the terms of
14 the 2008 and 2009 sales orders.²⁷ ECF No. 107 at 28–29.

15 Summary judgment is improper for this claim. Whether PPF acted in good faith when it
16 ordered aluminum from CALM based on CASS’s alleged threat to discontinue aluminum
17 shipments is a question of fact for a jury. Similarly, a reasonable jury could conclude that PPF
18 acted in bad faith when it failed to place even a single aluminum order with CASS during 2010,
19 even after it had affirmed in mid-2009 that it would order the remaining 2008 and 2009
20 aluminum during 2010. The court will therefore deny PPF’s motion for summary judgment on
21 this claim.²⁸

22 ///

23 ///

24 ///

25 ²⁷ PPF has not filed a counterclaim.

26 ²⁸ PPF also argues that the statute of limitations bars this claim but bases its assertion on the
27 arguments it raised for CASS’s breach-of-contract claims. Thus, the court similarly finds that the
28 claim is not barred.

1 **G. Counts 5 & 6: unjust enrichment and quantum meruit**

2 PPF has moved for summary judgment on CASS's unjust enrichment and quantum
3 meruit claims.²⁹ The theory of quantum meruit is based upon the premise that, when one renders
4 service or transfers property which is valuable to another, which the latter accepts, a promise is
5 implied to pay the reasonable value thereof. *See Hannon v. Wells Fargo Home Mortg.*, 2012 WL
6 2499290, *6 (D. Nev. June 26, 2012). To establish a quantum meruit claim, "a plaintiff must
7 show she conferred a benefit on the defendant, and the defendant appreciated, accepted, and
8 retained the benefit under circumstances such that it would be inequitable for him to retain the
9 benefit without paying for it." *In re Wal-Mart Wage and Hour Employ. Pract. Litig.*, 490 F.
10 Supp. 2d 1091, 1125 (D. Nev. 2007). However, a claim for quantum meruit is not actionable
11 when the claim is based on an express contract. *See Mobius Connections Grp., Inc. v. TechSkills,*
12 *LLC*, No. 2:10-cv-1678, 2012 WL 194434, *8 (D. Nev. Jan. 23, 2012); *see also Leasepartners*
13 *Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 756 (1997).

14 CASS bases both claims on the undisputed fact that (1) PPF received aluminum from
15 CASS that PPF did not pay for and (2) PPF failed to order 1,989,990 lbs. of hedged aluminum.
16 ECF No. 51 at 10–11. CASS's unjust-enrichment and quantum-meruit claims are thus solely
17 based on the same express contracts that underlie its two breach-of-contract claims. Because
18 there is no dispute that the 2008 and 2009 sales orders are valid contracts, the court must grant
19 PPF summary judgment on these two claims.

20 In reaching this conclusion, the court finds that it is necessary to clarify its earlier orders
21 on PPF's motions to dismiss. In its original complaint, CASS brought unjust enrichment and
22 quantum meruit as a single claim (ECF No. 1 at 6–7), which the court dismissed because the
23 claim was based on the express contracts between the parties (ECF No. 25 at 8–9). In its first and
24 second amended complaints, CASS pled the claims in the alternative to its breach-of-contract
25 claims pursuant to FRCP 8(d)(2). ECF No. 27 at 10–11; ECF No. 51 at 10–12. In ruling on
26

27 ²⁹ "Nevada treats quantum meruit claims and unjust enrichment claims very similar." *Mobius*
28 *Connections Grp., Inc. v. TechSkills, LLC*, No. 2:10-cv-1678, 2012 WL 194434, *8 (D. Nev.
 Jan. 23, 2012).

1 PPF's two subsequent motions to dismiss, the court held that CASS had sufficiently pled these
2 claims, which could "survive if CASS were unsuccessful on its express breach of contract
3 claims." ECF No. 48 at 12; *see also* ECF No. 62 at 7. The court explained that the claims were
4 sufficiently pled due, in part, to case law from this district that a party need not plead the
5 existence of an implied contract in order to survive a motion to dismiss. ECF No. 48 at 12 (citing
6 *Takiguchi v. MRI Int'l, Inc.*, No. 2:13-cv-1183, 2014 WL 4663851, at *11 (D. Nev. Sept. 18,
7 2014)).

8 However, based on the parties' current briefings, it appears that the court may not have
9 sufficiently explained its statement that these equitable claims could survive if CASS's breach-
10 of-contract claims failed. At the motion-to-dismiss stage, the court could not determine if the
11 sales orders that underlie CASS breach-of-contract claims were valid contracts. Because CASS
12 pled unjust enrichment and quantum meruit in the alternative, CASS could argue that these
13 equitable remedies applied in the event that the court held that the sales orders were not valid
14 contracts—not merely in the event that CASS failed to succeed on its breach-of-contract claims.

15 Here, at the summary-judgment stage, it is clear that there is no dispute that the sales
16 orders were valid contracts, and the undisputed evidence supports that conclusion. In turn, CASS
17 cannot recover under unjust enrichment or quantum meruit, and the court will therefore grant
18 PPF summary judgment on these two claims.

19 **III. Motion to strike**

20 Finally, PPF has moved to strike various exhibits attached to both of CASS's motions for
21 partial summary judgment. ECF No. 117.

22 **A. FRE 408 objections**

23 PPF argues that the June 18, 2010 email in which PPF acknowledged its debt to CASS
24 for the unpaid invoice balance and discussed the status of the remaining unpurchased hedged
25 aluminum (*see supra* § I.A.9) is inadmissible under Federal Rule of Evidence 408. PPF similarly
26 argues that the rule prohibits the court from considering the content of the December 30, 2010
27 letter (*see supra* § I.A.9) sent from PPF's counsel to CASS's counsel.

28 ///

1 Under FRE 408, “evidence from settlement negotiations may not be considered in court
2 ‘when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to
3 validity or amount, or to impeach through a prior inconsistent statement or contradiction.’”
4 *Rhoades v. Avon Prod., Inc.*, 504 F.3d 1151, 1161 (9th Cir. 2007) (emphasis omitted) (quoting
5 Fed R. Evid. 408(a)). But by its explicit terms, the rule does not exclude evidence of settlement
6 negotiations not offered for prohibited purposes. *See id.*; Fed. R. Evid. 408(b). “In other words,
7 Rule 408 is designed to ensure that parties may make offers during settlement negotiations
8 without fear that those same offers will be used to establish liability should settlement efforts
9 fail. When statements made during settlement are introduced for a purpose unrelated to liability,
10 the policy underlying the Rule is not injured.” *Rhoades*, 504 F.3d at 1161–62; *see also* 23
11 Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5308 (1st ed.) (“Rule 408
12 is not an absolute ban on the admissibility of evidence that falls within its scope. . . . If offered
13 for some other purpose, the evidence is admissible.”).

14 Here, PPF has generally objected to the introduction of both documents, but it has not
15 addressed *how* CASS has attempted to use this evidence—cited throughout multiple filings and
16 included in a voluminous record—to establish PPF’s liability. The court will therefore address
17 the context in which it considered both documents in its analysis above.

18 In regards to the June 18 email, the court primarily relied on this evidence in the context
19 of CASS’s second contract claim to determine that PPF acknowledged its debt and that the
20 statute of limitations had therefore not run. *See supra* § II.D.1. At least one circuit court has
21 specifically found that evidence of settlement negotiations is not prohibited when “admitted for
22 the purpose of establishing when the statute of limitations began to run, which is separate from
23 establishing the elements of the underlying breach of contract claim.” *B & B Hardware, Inc. v.*
24 *Fastenal Co.*, 688 F.3d 917, 920 (8th Cir. 2012). This court agrees with that conclusion.

25 The court also considered both the June 18 email and the December 30 letter in regards to
26 CASS’s first contract claim in order to determine the parties’ positions regarding the status of the
27 unpurchased aluminum after Alcoa unwound in May of 2010. *See supra* § II.C.2.c. As discussed
28 above, the court determined that, based in part on these documents and the assertions that the

1 parties made in their briefings, it was unclear whether PPF was able to continue purchasing
2 aluminum after the unwinding. The court therefore finds that this evidence was not considered
3 for the purpose of proving or disproving PPF's liability.

4 The court will therefore deny PPF's motion as to both exhibits without prejudice; PPF
5 may, if relevant, raise this issue in the future as a motion in limine.

6 **B. Hearsay objection to spreadsheet of CALM invoices**

7 Next, PPF argues that an exhibit consisting of an excel spreadsheet that lists PPF's orders
8 for aluminum from CALM (ECF No. 108-4 at 87) is inadmissible hearsay. CASS counters that
9 this exhibit is merely a demonstrative aid that compiles the data listed in each CALM invoice
10 that CASS also provided as an exhibit. The court agrees and finds that the spreadsheet is an
11 admissible demonstrative aid. *See United States v. Baker*, 10 F.3d 1374, 1410 (9th Cir. 1993),
12 *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000); *see also*
13 *United States v. Gardner*, 611 F.2d 770, 776 (9th Cir. 1980).

14 **C. Objections to purportedly undisclosed documents**

15 Finally, PPF argues that, because several documents attached as four different CASS
16 exhibits are not bates stamped, they were likely undisclosed and should therefore be stricken.
17 CASS responds by citing at what point in this litigation all but one³⁰ of the disputed exhibits
18 were produced by either CASS or directly by PPF. ECF No. 128 at 8–9. The court directs the
19 parties to meet and confer on such issues in the future before raising them as a motion.

20 Based on the foregoing, PPF's motion to strike will be denied.

21 **IV. CASS's evidentiary objections**

22 As a final note, the court has reviewed CASS's various objections to PPF's filings and
23 finds that they are pro forma and do not affect the instant motions' disposition. Such objections
24 are not required under the Federal Rules of Civil Procedure and need not be filed in the future.

25 ///

26
27 ³⁰ One exhibit is a spreadsheet that CASS included that calculates the amount of interest that
28 PPF would owe on the second breach-of-contract claim. ECF No. 128 at 9. Because the court has
found that CASS is barred from claiming contractual interest on this claim, this objection is
moot.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2
3
4
5
6

7
8

9
10
11

12

13

14

15

16

17

18
19